IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
SANFORD P. KRIGEL,	)	**SUPREME COURT NO. 95098**
	)	
Respondent.	)	

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Respondent agrees with the Informant's statement of jurisdiction.

STATEMENT OF FACTS

This Court licensed Sanford P. Krigel to practice law in Missouri, over 39 years ago, in 1976. He continues to practice law in the State of Missouri. Mr. Krigel is also licensed to practice in the United States District Court for the Western District of Missouri, the United States District Court for the District of Kansas, and the United States Court of Appeals for the Eighth Circuit. He remains in good standing in all jurisdictions in which he is licensed and has never been the subject of a disciplinary action. (S.App at A79, A127-28; A129)[Disciplinary Hearing Transcript ("DHT") at 151; 340-346].[1]

Mr. Krigel is a founder, shareholder and the managing member of Krigel & Krigel, P.C. in Kansas City, Missouri. He has practiced law with his wife since 1979. While Mr. Krigel maintains a general practice, at times up to fifty percent of his legal work has been in the fields of family law and adoptions. (S.App at A128)[DHT at 341-43]. Additionally, for the last several years, he has practiced in the area of assisted reproductive technology law. (S.App at A79; A128)[DHT at 151-52; 344]. In addition to the Missouri Bar, Mr. Krigel is a member in good

[1] References are to Supplemental Record filed under Seal (S.R. at __) and to the Supplemental Appendix filed under Seal (S.App at ___). References when applicable include the specific page citation to the Disciplinary Hearing Transcript, [DHT at ____].

standing of the Kansas City Metropolitan Bar Association and the American Bar Association. (S.App at A128)[DHT at 341]. He has been involved in legislative activities in Missouri regarding the area of adoption law and in particular the Putative Father Registry. (S.App at A128)[DHT at 344]. Mr. Krigel gives back to the community with his work in a variety of charitable organizations including Midwest Foster Care and Adoption Association, the Jewish Community Relations Bureau, the Kansas City Human Rights Commission, Operation Breakthrough, Boys and Girls Club, and Shalom Geriatric Center. He is a recipient of the Congressional Coalition on Adoption Institute Angels in Adoption Award in recognition for his work in the adoption, foster care and child welfare community. (S.App at A128)[DHT at 341-43].

THE PREGNANCY

The birth mother and the birth father[2] met in college and began a monogamous relationship in 2007. (S.App at A68)[DHT at 105]. The relationship proved at times to be difficult. In 2007, they got into a fight and birth father struck birth mother in the nose, requiring her to go to the hospital. (S.App at A68)[DHT at 107]. Birth father and birth mother lived together while in college at Baker University and also in Lawrence Kansas. (S.App at A68)[DHT at 105]. From July,

[2] Consistent with the Order of Protection entered herein, references to the biological parents are by use of the phrase "birth mother" and "birth father."

2009 until approximately March, 2010, the biological parents lived off and on together at the home birth mother in Kansas City, Missouri. (S.App at A68)[DHT at 105-07]. Birth father did not tell his parents that he lived with birth mother because he was afraid his parents would not approve. (S.App at A68)[DHT at 106-07]. Birth father's parents did not have a good opinion of birth mother and did not get along with her. (S.App at A69)[DHT at 111].

In August, 2009, while birth father and birth mother lived together, birth mother found out she was pregnant. This was not the first pregnancy in the relationship; the couple mutually agreed to terminate the first pregnancy. (S.App at A68)[DHT at 108]. Upon finding out that she was pregnant, birth mother and birth father discussed options, including terminating the pregnancy. However, because they were unable to gather the money together to terminate the pregnancy, they decided to have the baby. (S.App at A68)[DHT at 108]. From the time that the biological parents found out about the pregnancy until March, 2010, they didn't talk very much about what they were going to do with the baby. (S.App at A76; A78)[DHT at 139; 146]. Birth father found the situation stressful and did not have serious conversations with birth mother about their plans regarding the child. (S. App at A78)[DHT at 146-47]. The biological parents occasionally looked at baby clothes and items. However birth father did not make any purchases in preparation for the baby prior to his birth. (S.App at A76; A78)[DHT at 139; 146.

While on a few occasions birth father and birth mother discussed living together and raising the baby together, those discussions changed in March, 2010 when they could no longer hide the pregnancy from their respective parents. A meeting occurred on March 5, 2010 between the families to discuss the baby's future. (S.App at A55; A69)[DHT at 53; 110-12]. Birth father and his parents suggested raising the child at their house. Birth mother's parents wanted birth father to marry their daughter. However birth father did not want to get married. (S.App at A69)[DHT at 111-12]. After birth father refused to marry birth mother, she and her family expressed to birth father and his family that they were going to pursue adoption. Birth mother's parents had adopted birth mother. Birth mother believed that a two parent home would be in the child's best interests. Birth father understood birth mother and her family's desire to place the baby for adoption (S.App at A69)[DHT at 112]. The March 5, 2010 meeting was not friendly; members of the families got mad and upset. As a result of the meeting, the couple broke up. (S.App at A70; A77; A312)[DHT at 115-16; 144, 483; 486-487].

Either at the March 5th meeting or soon thereafter, birth father, at the urging of his mother, began to question whether he was the father of birth mother's child. Birth father asked for DNA testing. (S.App at A70)[DHT at 116]. Around this time, birth mother's father became angry and told birth father he didn't want him at

his house anymore. Birth mother's father demanded the house key he had given to birth father returned and told birth father that he should not trespass on the property or the father would obtain a restraining order. (S.App at A70)[DHT at 113]. Both families agreed that further communications by any family members, including birth father and birth mother, should be through their respective attorneys.

A few days after the March 5, 2010 meeting, birth mother went to the doctor and learned that her due date was April 8, 2010. That information was relayed from birth mother's mother to birth father's mother, who told her son. (S.App at A57; A71)[DHT at 119-20].

BIRTH FATHER AND HIS FAMILY RETAIN MR. ZIMMERMAN

An acquaintance of birth father's father and brother, Jeff Zimmerman, an attorney from Shawnee, Kansas, practiced law in both Kansas and Missouri. Mr. Zimmerman primarily practiced real estate and business law. (S.App at A89; A91-92)[DHT at 191; 200-20]. Birth father contacted Mr. Zimmerman around March 5, 2010 and told him about his girlfriend's pregnancy, that she wanted to have the baby adopted, and that he was given some options. He wanted to consult with Mr. Zimmerman regarding the situation. Despite telling birth father that he was not a family law lawyer, Mr. Zimmerman agreed to meet with him and give him some recommendations. (S.App at A89)[DHT at 192]. Mr. Zimmerman perceived the

issue as one wherein the biological parents could not agree how the child should be raised; that he would give them his advice as to how to resolve their problem. (S.App at A98)[DHT at 193].

At no time during his representation of the birth father did Mr. Zimmerman research adoption law, research paternity actions or research the Missouri Putative Father Registry. During law school in the 1970's Mr. Zimmerman took some family law classes. He relied on his recollection of the information he learned in law school to make his recommendations to birth father and his family. (S.App at A93; A95)[DHT at 208; 216]. Mr. Zimmerman never attempted to learn where the biological mother lived. Mr. Zimmerman never recommended that his client register on the Putative Father Registry and did not recommend that birth father file a petition establishing paternity. (S.App at A74; A77)[DHT at 129; 141]. Early during his representation of birth father, Mr. Zimmerman was told that the families of birth father and birth mother agreed to only communicate through attorneys. (S.App at A90; A93)[DHT at 94; 207-08].

Mr. Zimmerman did not recommend that birth father register with the Putative Father Registry because he did not know that it existed. (S.App at A92)[DHT at 202]. He did not make any effort to determine whether birth father could file a paternity action. (S.App at A94)[DHT at 209].

BIRTH MOTHER AND HER FAMILY'S

FIRST CONTACT WITH MERRYFIELD

Hillary Merryfield, a licensed clinical social worker (LCSW) in the states of Missouri and Kansas, has worked in the areas of adoption and counseling for biological mothers since 1986. She operates a licensed child placement agency, Adoption Option, Inc. Ms. Merryfield assists infertile couples who are looking to adoption to build a family and also provides counseling services for birth parents. She works with courts located in both Kansas and Missouri providing home studies for prospective parents. (S.App at A160-61)[DHT at 471-45]. At the time of the Disciplinary Hearing, in late 2014, Ms. Merryfield had conducted over 1,000 home studies and had been involved in over 970 adoption. (S.App at A161)[DHT at 475].

In early March, birth mother's mother contacted Ms. Merryfield and asked for advice. Ms. Merryfield was familiar with birth mother and her mother as she had assisted birth mother's parents in the adoption of birth mother (S.App at 163)[DHT at 481-82]. The birth mother's mother told Ms. Merryfield that the birth parents had been together for several years, had initially planned to parent the baby together, but had broken up. Birth mother and her family wanted to find out what options were available to them. (S.App at 163)[DHT at 483]. Ms. Merryfield referred the birth mother and her family to Mr. Krigel, whom she had known for over 24 years as an expert in the field of family law and adoption. She

knew Mr. Krigel as very ethical and an advocate for his clients. (S.App at A80; A163)[DHT at 154; 483-84].

Shortly thereafter, Ms. Merryfield met with birth mother and her parents. Birth mother told her that the baby needed more than what she could give him. She also told Ms. Merryfield that she and birth father had broken up after they told their parents about the pregnancy during the March 5, 2010 meeting with her parents. Birth mother provided Ms. Merryfield the birth father's name and whereabouts. (S.App at A164)[DHT at 485-487].

MR. KRIGEL AGREES TO REPRESENT

BIRTH MOTHER ON MARCH 11, 2010

Mr. Krigel met with the birth mother and her family for the first time on March 11, 2010. They told him about birth mother and birth father hiding the pregnancy and only disclosing the pregnancy to their parents, roughly a week earlier, during birth mother's eight month of pregnancy. (S.App at A130)[DHT at 352]. Birth mother and her family described the March 5th meeting, including birth mother's devastation that birth father and his family had suggested that birth father was not, in fact, the father of her child. (S.App at A130)[DHT at 352]. Birth mother told Mr. Krigel that she and birth father originally intended to raise the baby together. However birth mother did not have a good relationship with birth father's family. (S.App at 131)[DHT at 350]. Birth mother expressed to Mr. Krigel

that as an adopted child she believed that if she and the birth father were not going to raise the child together, it would be in her child's best interests to be raised in a home where there was both a mother and father. (S.App at 130-31)[DHT at 352-53].

During this first meeting, birth mother told Mr. Krigel the name and whereabouts of birth father. She told Mr. Krigel that her due date was approximately April 8, 2010 and that birth father knew the due date. (S.App at 131)[DHT at 354-55]. Birth mother stated to Mr. Krigel that birth father had not provided any type of financial support for either her or the unborn child; that he had not purchased any necessities for the unborn child; that he had not provided any living expenses for her; and that he had not helped pay for any of her medical care. In fact, the birth mother had not participated in any prenatal care until her eighth month of pregnancy. (S.App at A131-32)[DHT at 356-57].

During the March 11th meeting, birth mother and her family advised Mr. Krigel that birth father would not consent to the adoption but that they did not believe he would affirmatively do the steps necessary to assert his parental rights; he was a "definite maybe" on providing consent for an adoption. (S.App at A132)[DHT at 359-60]. The birth mother and her family also told Mr. Krigel that the families had agreed to only communicate through attorneys. (S.App at A104)[DHT at 249].

As customary with all potential clients, Mr. Krigel outlined the status of Missouri law to birth mother and her family. He explained to birth mother what was required of a birth father to assert his paternal rights, including the rights provided under the Missouri Putative Father Registry as well as his right to file a paternity action. He told her the criteria by which one could proceed with an adoption without receiving one or both parents' consent. (S.App at 133)[DHT at 361-62]. Mr. Krigel advised birth mother of her legal rights under Missouri law, including that she had no affirmative duty to tell the biological father of the birth of the child or her interest in consenting to the termination of her parental rights; he discussed with her the required time frames for birth father to assert his parental rights in order that his consent be required for an adoption to proceed. (S.App at A101)[DHT at 240]. Mr. Krigel also explained to birth mother and her family that just because birth mother consented to the termination of parental rights, that did not mean the adoption would move forward. If birth father followed the procedures available under Missouri law, his consent would be required and the adoption might not be completed. (S.App at A107)[DHT at 262-63]. Mr. Krigel likewise explained to birth mother her right to keep the child and wait to see whether the birth father would take any affirmative action to either assert paternity or consent to the termination of his parental rights. (S.App at A149)[DHT at 425].

Mr. Krigel advised birth mother at that meeting on March 11th and many times afterwards, that at all times she had to be truthful. He specifically told her that she could not transmit false information to birth father (S.App at A133)[DHT at 363-64]. Mr. Krigel orally admonished birth mother to tell the truth. He did not give any written instructions to birth mother to tell the truth or not do anything else that could be construed as misleading; Mr. Krigel could not recall ever giving any client such written instructions. However he always told his clients that they had to tell the truth. (S.App at A82)[DHT at 163-64]. Mr. Krigel, based on the information received regarding the acrimony between the families, the circumstances existing at the time, including birth father requesting confirmation of paternity, and the decision by the families not to communicate but through attorneys, believed that such an arrangement was appropriate and advised birth mother that she should not directly communicate with birth father (S.App at A102)[DHT at 244-45].

At the March 11, 2010 meeting Mr. Krigel agreed to represent birth mother. The scope of his representation was to advise birth mother of her rights to move forward with an adoption. (S.App at A80)[DHT at 154-55]. Birth mother retained Mr. Krigel to provide legal advice regarding her legal rights, to assist her with filing a consent to terminate her parental rights with the courts, and to represent her at a Consent to Terminate Parental Rights hearing (S.App at A100)[DHT at 254;

362-63]. [3] Consistent with his custom and practice, Mr. Krigel sent birth mother an engagement letter. (S.App at A145)[DHT at 412].[4] Within a few days after the March 11th hearing, birth mother advised Mr. Krigel that she wanted to pick prospective adoptive parents and move forward with a proposed adoption. (S.App at A100)[DHT at 363].

Mr. Krigel believed that birth mother's case represented a typical scenario he saw dozens of times every year; a birth father who would not consent to termination of parental rights and adoption but who did nothing affirmatively to show his paternity or protect his legal rights. (S.App at A132)[DHT at 358]. As birth mother's case progressed, Mr. Krigel's legal strategy in the case became one

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[3] Despite inferences to the contrary, Mr. Krigel was not retained to represent the adoptive parents, did not file any original pleadings in the adoption case, and was not present for the hearing on the Petition for Transfer of Custody and Adoption. (S.App at A101)[DHT at 238-39].

[4] In its Statement of Facts, Informant disingenuously makes an issue of Mr. Krigel not producing an engagement letter at the Disciplinary Hearing (Informant Brief at 8-9). Because Informant did not request any discovery prior to the Disciplinary Hearing and had never claimed any improprieties regarding the engagement letter, itself, Mr. Krigel neither produced the engagement letter prior to the hearing nor brought it with him to the hearing. (Tr. at 155-158).

of "actively doing nothing" or to be "passive." During the Disciplinary Hearing, he described it as follows:

> Missouri's law with respect to adoptions is very clear and was very clear in 2010 that if a birth parent, let's talk about a birth father in this case, if a birth father fails to do certain things, then there is no obligation on the part of the attorney bringing the adoption. Although I wasn't the attorney bringing the adoption we were working with that attorney.
>
> There's no obligation on the attorney bringing the adoption if the putative father who is not married to the woman who had the baby, if that putative father fails to take certain action, then there is no obligation to deal with that person as a father. Missouri law is very clear in that regard.

(S.App at A81)[DHT at 159-60]. Thus Mr. Krigel and his client waited to see whether or not birth father took any affirmative steps to assert his paternity or protect his paternal rights such as placing his name on the Missouri Putative Father Registry or filing a paternity action.

It was not surprising that Mr. Krigel took this approach. The passive strategy is not unusual and is widely used by Missouri lawyers who handle adoptions. Professor Mary M. Beck testified that she is very familiar with the

strategy, that it is consistent with the usual and customary practice among Missouri adoption attorneys, and she teaches her students about it. (S.App at A158-159) [DHT at 461-465]. Professor Beck also testified to her opinion that the strategy was consistent with Missouri law and a common practice. (S. App at A157)[DHT at 459].

Like Professor Beck, Mr. Krigel believed that a strategy of waiting to see whether or not the putative father took the steps necessary to assert his paternity and protect his paternal rights was consistent with Missouri law. The following exchange by Informant's counsel and Mr. Krigel at the Disciplinary Hearing demonstrates this belief.

Q. The right to parent and the right not to parent are very important fundamental rights that are deserving of legal protection, correct?

A. Yes, Constitutionally protected rights.

Q. And you would have an understanding that due process certainly comes into play in the type of work that you do?

A. Absolutely.

Q. How did due process and notice and opportunity to be heard come into play in your strategy for this case?

A. There's a long line of Supreme Court cases, U.S. Supreme Court cases, that start with Stanley and there's all kind of progeny after that

that talk about what the rights are of putative fathers. Missouri Putative Father's Registry was tailored after the Supreme Court cases that spoke to issues in due process, Constitutional rights, and our passive strategy of not doing anything was completely consistent with what the U.S. Supreme Court has stated and what Missouri law provides for.

Q. Was it part of your strategy to deprive the father of an opportunity to gain information about something fundamental and critical as the date of his child's birth.

A. Absolutely not. That was not our strategy. Our strategy was to wait and see if he would step forward and do those things he was supposed to do.

Q. And as this played out, isn't that what happened? Wasn't the father deprived of an opportunity to gain information about the birth of his child?

A. He wasn't deprived of anything that he and his attorneys couldn't have remedied if they followed the law.

(S.App at A99-100)[DHT at 232-33]. Mr. Krigel's actions demonstrated his belief that his strategy was consistent with Missouri law. As the case progressed Mr. Krigel relayed the fact that he was employing a "passive" or "wait and see"

strategy to both the prospective adoptive parents' attorney, Michael Belfonte, and to the guardian ad litem appointed prior to the Consent to Terminate Parental Rights hearing, Michael Mann, as well as to Commissioner Merrigan during the hearing held to approve birth mother's consent to terminate parental rights. (S.App at A103)[DHT at 245].

THE MARCH 19, 2010 TELEPHONE CONVERSATION

Sometime after the first meeting with Mr. Zimmerman, birth father contacted him and told him that the name of birth mother's attorney was Sanford Carigal and provided a phone number. Mr. Zimmerman called the phone number which was answered Krigel and Krigel. He immediately knew that the Sanford was Sandy Krigel. (S.App at A90)[DHT at 194]. Mr. Zimmerman and Mr. Krigel had known each other since junior high school and occasionally crossed paths socially. (S.App at A87; A90; A94)[DHT at 184; 194; 209-10]. Both Mr. Zimmerman and Mr. Krigel recall that the telephone conversation was short, probably 15 minutes or less. (S.App at A87; A90; A136)[DHT at 183-84; 374]. Mr. Krigel testified that he did not remember every word of the telephone conversation. (S.App at A136)[DHT at 376]. Mr. Zimmerman and Mr. Krigel both recall that the principle subject of the conversation centered on the birth parents' need for counseling. (S.App at A57; A95)[DHT at 183; 213]. Mr. Zimmerman recalled telling Mr. Krigel that the biological father did not want to consent to an

adoption. (Tr. At 194). Mr. Krigel did not remember Mr. Zimmerman stating categorically that birth father would not consent to the adoption. (S.App at A148)[DHT at 421]. However Mr. Krigel had already been advised by his client that birth father had not, at that time, agreed to consent to the adoption. (S.App at A67; A87)[DHT at 104; 182-83].

Mr. Zimmerman recalled that after he told Mr. Krigel that birth father did not want to consent to an adoption that Mr. Krigel said something to the effect of "Well, without the father's consent I don't think there will be an adoption," or "without the father's consent there wouldn't be an adoption." (S.App at A90; A98)[DHT at 194; 214-15]. Mr. Zimmerman acknowledged that he did not have a clear recollection of what Mr. Krigel said and that he could only recount his impression of what was said. (S.App at A95)[DHT at 215]. He also admitted that he could have misconstrued Mr. Krigel's statement; that his impression of what he heard was influenced by what he thought was the general Hornbook law of adoption. (S.App at A95-96)[DHT at 216-17]. Mr. Zimmerman stated that he interpreted Mr. Krigel's statement "to the effect of there's a hurdle if you don't have the parents' consent to an adoption." (S.App at A95; A98)[DHT at 216; 227].

Significantly Mr. Zimmerman stated that while he construed Mr. Krigel's statement as a statement of fact, that: (1) he did not take the statement as any kind of commitment to him one way or another; (2) that Mr. Krigel did not make any

promise to him that there wouldn't be an adoption; (3) Mr. Krigel and Mr. Zimmerman did not have any agreement; and (4) Mr. Zimmerman's interpretation that the case would not move forward without dad's consent was based on his thought process, not on anything specifically told to him by Mr. Krigel. (S.App at A95-96; A98)[DHT at 214-17; 227-28]. Likewise, Mr. Zimmerman never asked Mr. Krigel for any legal advice; he did not ask Mr. Krigel to call him after the birth parents had their counseling session; he did not ask Mr. Krigel to call him or advise him when the child was born; he did not ask Mr. Krigel to delay an adoption proceeding until he was called; he did not ask in what hospital was the baby to be born; and he did not ask where the mother resided. (S.App at A96; A136)[DHT at 220; 375]. In fact, in response to a hearing panel member's question, Mr. Zimmerman stated that he was not upset that Mr. Krigel had not contacted him about the birth mother's move to place the child for adoption. (S.App at A98)[DHT at 225]. Rather Mr. Zimmerman reflected that

> I mean I've been practicing law long enough and have had things with people that I know pretty well, and, you know, there's –you have to draw the line between, you know, friendship part and the legal representation part.

(S.App at A98)[DHT at 225]. While Mr. Zimmerman acknowledged that he never got a "heads-up" from Mr. Krigel, he also admitted that that no "heads-up" was

promised; Mr. Zimmerman stated that "I think that I would have given someone a heads-up, but that's just me." (S.App at A92; A98)[DHT at 201; 225].

Mr. Krigel testified that he did not withhold information from Mr. Zimmerman but did not volunteer information since he believed that doing so would violate his ethical obligations to his client.

Q. Did you—we heard a lot of questions from you yesterday about you offering information to Mr. Zimmerman. Did you offer information to Mr. Zimmerman?

A. It felt like I was really responding to his questions when he would ask for something like is there a suitable person to meet with these people? I know you do this a lot, Sandy. I said, yeah, there's this great person that my clients already talked to that would be ideal.

Q. Well, I guess my question is, and maybe I'll just get right down to the nuts and bolts of it is, did you feel like you had an ethical obligation under the rules of – Missouri Professional Rules of Conduct to tell Mr. Zimmerman the information that your client had disclosed to you?

A. Well, I think just the opposite. There was certain confidential things my client told me that I probably should never have told anyone and I didn't tell anyone.

Q. Did you think you had an obligation to tell him what your plan and objectives were based – I should say what your plan was based upon the objectives of the representation your client outlined in your meeting with her?

A. I think it would have been inappropriate for me to tell Mr. Zimmerman that we were assuming this stance where we were going to wait and see if his client did the right thing. I did not tell Mr. Zimmerman that. I think I would have breached my ethical obligations to my client if I had explained it.

(S.App at A88; A135)[DHT at 185; 370-71]. In response to a question posed by Informant's counsel, Mr. Krigel responded that at the time of the telephone conversation with Mr. Zimmerman, the litigation strategy to wait and see what birth father was going to do had not yet fully developed. Mr. Krigel still believed on March 19th that birth mother loved birth father and that they would have gotten back together if the families had not been involved. (S.App at A88)[DHT at 188]. Mr. Krigel did not intentionally do anything during his conversation with Mr. Zimmerman that would cause Mr. Zimmerman to misunderstand or misconstrue him. (S.App at A88)[DHT at 186]. In a colloquy with Informant's counsel, Mr. Krigel testified as follows:

Q. Do you think there's anything you said in that conversation that could have been misunderstood or misconstrued?

A. You have to ask Mr. Zimmerman that. I did not intentionally do anything that would cause him to misunderstand or misconstrue.

Q. Okay, but you understand that sometimes two people can have a conversation and they are talking about totaling different things?

A. I will agree to that. People's perceptions are different.

The evidence adduced from Mr. Zimmerman and Mr. Krigel suggested that the attorneys may have had different understandings and perceptions regarding the subject of the conversation and its results.

During the telephone conversation, Mr. Zimmerman and Mr. Krigel discussed an appropriate person to provide counseling for the birth parents. Mr. Krigel recommended Ms. Merryfield because she was already involved with the birth mother and because he believed she would work well with the biological parents. Mr. Zimmerman claimed that he did not recall or did not understand from his conversation with Mr. Krigel that Ms. Merryfield was involved in the adoption process. (S.App at A91)[DHT at 199]. At the conclusion of the telephone conversation between he and Mr. Krigel, Mr. Zimmerman indicated an intent to contact Ms. Merryfield to set up a meeting.

THE BIRTH PARENTS

MEET WITH HILLARY MERRYFIELD

Mr. Krigel contacted Ms. Merryfield to advise her that Mr. Zimmerman would be calling to set up an appointment for birth father and birth mother. Ms. Merryfield testified at the Disciplinary Hearing that Mr. Krigel did not ask Ms. Merryfield to obtain a consent for adoption from birth father and did not provide her any instructions regarding the anticipated meeting. (S.App at A166)[DHT at 495-96]. Mr. Zimmerman contacted Ms. Merryfield to set up an appointment. Ms. Merryfield stated that she told Mr. Zimmerman that she was associated with Adoption Option and that she had met with the birth mother. She also testified that Mr. Zimmerman told her that he was concerned about the mother of the birth father and her influence over him; that he wanted his client and the birth mother to speak with someone away from their parents to see if they could come up with a mutual decision about what was best for the child. Ms. Merryfield told Mr. Zimmerman that she would discuss all options with the birth parents. Mr. Zimmerman did not ask Ms. Merryfield to call him back after the meeting. (S.App at A166-67)[DHT at 496-98].

Ms. Merryfield told the Hearing Panel that she did not view her meeting with the parents as a counseling session but rather as more of a mediation. Her job was to try to help the two young parents to come together and make a good decision, jointly, for the best interests of their child. (S.App at A167)[DHT at 498].

The meeting between birth father and birth mother occurred on March 22, 2010 at Ms. Merryfield's office. (S.App at A72)[DHT at 122]. The sign on her office door stated "Adoption Option, Inc." Two of the four walls in her office were filled with photographs of adopted children and one wall had a sign the said "Adoption Option." (S.App at A72)[DHT at 122-23]. Birth father understood that adoption was going to be discussed at this meeting. During the meeting Ms. Merryfield spoke with the birth parents about four options: (1) to live together and raise the child together; (2) for the birth father and his family to raise the child with the birth mother visiting; (3) for the birth mother and her family to raise the child with the birth father visiting; and (4) adoption. (S.App at A167)[DHT at 499-500]. During the meeting, birth father expressed his understanding that birth mother wanted to place the child for adoption. However he continued to state he was not in favor of adoption. (S.App at A73)[DHT at 125-26]. During the meeting Ms. Merryfield provided birth father with adoption profiles and told him that she was working with birth mother to place the child for adoption. (S.App at A73)[DHT at 127]. The couple talked with Ms. Merryfield about the due date and the hospital where the child was going to be born (S.App at A168)[DHT at 501-02]. Despite having this information, birth father never asked to go to the hospital or to be told when the child was born. At the conclusion of the meeting, the birth parents did not reach an

agreement about whether to co-parent the child or place the child for adoption. (S.App at A168)[DHT at 503-04].

At page 14, fn 3 of Informant's Brief, Statement of Facts, Informant states that "Ms. Merryfield did not provide birth father with any counseling about the Missouri Putative Father Registry", *citing* S.App. at 173. (S.App at A173)[DHT at 523]. The actual question and response regarding the Putative Father Registry was as follows:

> Q. Okay. In your adoption, in your – at your business, do you have any pamphlets or any information anywhere about the Putative Father Registry?
>
> A. No, I am not a lawyer.
>
> Q. I understand. I was just interested in knowing.
>
> A. A lot of birth fathers will say I don't want an adoption. That is very common, very common. Very few stop an adoption. So for me to be told I don't want my baby to go up for adoption, what does that mean? And sometimes that's all it means. I don't want it. But then we never hear from them again or they – he had an attorney. My job was a one hour meeting. He had an attorney.

(S.App at A173)[DHT at 523-24]. Ms. Merryfield did not provide any information to birth father or any other client about the Missouri Putative Father Registry in her

role as a mediator between the birth father and birth mother. She believed that such information should come from an attorney.[5]

Ms. Merryfield's impression of birth father from the meeting on March 22nd was that he was hurt, passive and sad; that while he did not want an adoption, he

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[5] Informant at p. 14, fn 3 cites to Professor Mary Beck's testimony out of context to suggest that birth father's ignorance of the registry or the lack of Missouri registrants justified his failure to comply with the law or to protect his parental rights. Professor Mary M. Beck's testimony actually focused on why so few men in Missouri utilize the registry rather than whether people know about the registry. While she acknowledged that very few men register with the Punitive Father Registry in Missouri, she also provide an explanation of why the registry is not used:

> Q. So just say-I am just curious. How many-how many biological fathers actually register on the Putative Father Registry?
>
> A. Very few, very few. It's interesting in Missouri, very few men register because our registry specifically says your registration may be used in child support enforcement hearings. In Indiana, they've forbidden use of the registry in child support actions. Indiana has over 50 registrations a week. Missouri probably doesn't have much over 50 in a, I don't know, 15 whatever years that have been in existence.

(S.App at A159)[DHT at 466-67].

was not going to do anything to stop it (S.App at A168-69)[DHT at 502-03]. Following the mediation Ms. Merryfield did not call Mr. Zimmerman. Ms. Merryfield stated that the reason she did not call Mr. Zimmerman was because she believed that the discussions she had at the meeting with her client, birth mother, were confidential; that Mr. Zimmerman could discuss the meeting with his client, birth father. (S.App at A167)[DHT at 498-99]. In that same vein, Mr. Krigel represented birth mother and contacted Ms. Merryfield to see how the meeting went and to find out whether birth mother still wanted to move forward with placing her child for adoption. (S.App at A134; A169)[DHT at 366-67; 506-07]. Ms. Merryfield advised Mr. Krigel of her impressions of birth father, that birth father was not in favor of the adoption, that she was unsure whether birth father was going to protect his rights, and confirmed that birth mother still wanted to proceed with the adoption. (S.App at A169)[DHT at 506-07].

Mr. Krigel testified before the Disciplinary Hearing Panel that the perception of Ms. Merryfield, that birth father was passive and not likely to contest the adoption, significantly impacted his recommendation to his client. Ms. Merryfield's observations regarding the birth father's passive behavior was consistent with the information obtained from his client and her parents. (S.App at A137)[DHT at 380]. Mr. Krigel shared this information with the prospective adoptive parents' attorney, Michael Belfonte. Mr. Krigel advised Mr. Belfonte that

his client and Ms. Merryfield believed that while birth father may not consent to the adoption, he may not take the steps necessary to stop the adoption from going forward. Mr. Krigel further testified, "And he shared my beliefs based on the information he had received, so – Mr. Belfonte and I knew each other very well, we've worked together, and we were on the same wave length." (S.App at A138)[DHT at 383]. Mr. Krigel believed that based on the information available that birth dad would not affirmatively assert his parental rights; "it felt like it was our typical scenario of a birth father not doing those things he would need to do to assert his rights, so yes." An additional factor impacting Mr. Krigel's belief that birth father may not pursue his parental rights was birth father's denial of paternity after his parents' involvement. Mr. Krigel testified

> I think today that any biological father who is denying paternity is probably a good candidate for not asserting his parental rights. So from the standpoint of our passive strategy in this case, my conclusion was that this sounded consistent with many hundreds of other cases that I have done like this where the likelihood of the biological father not doing what he needed to do was very high.

(S.App at A133)[DHT at 364].[6]

COMMUNICATIONS BETWEEN BIRTH FATHER AND BIRTH MOTHER

Unbeknownst to Mr. Krigel, birth mother continued to communicate with birth father after the March 22, 2010 meeting with Ms. Merryfield. Birth mother made affirmative statements to Mr. Krigel, as well as in response to his questioning of her, that she was not communicating with birth father (S.App at A136; A139)[DHT at 378; 385]. Mr. Krigel, long after the hearing to Approve Consent and Temporary Custody, learned that birth mother had met with birth father the day after the March 22, 2010 meeting at a local McDonalds. (S.App at A55; A103; A137)[DHT at 56; 245; 378]. Likewise, Mr. Krigel learned long after the April 8th hearing that birth father communicated with birth mother by Instagram and other

[6] Informant's Statement of Facts, p. 8. states that "Respondent understood that birth father [sic] was the biological father and there was no serious question regarding paternity," *citing* to (S.App at A131)[DHT at 354]. This representation mischaracterizes Mr. Krigel's testimony at p. 354. Mr. Krigel testified that he questioned his client at great length about who the father was and she told him "absolutely positively couldn't be anybody other than the birth father." (S.App at 131)[DHT at 354]. There is a distinction between a birth mother asserting who the father was and a "serious question about paternity" in a case, especially where the putative father was questioning paternity.

electronic means. In the communications, birth mother allegedly lied to birth father and told him that the due date of the birth had been pushed back to May.[7] Mr. Krigel, while advising his client not to communicate with birth father, never advised her to mislead or lie to birth father.

THE CONSENT HEARING

[7] Informant offered Exhibits 19, 24, 25, and 31, (S.R. at 356; 372; 373 and 399) summaries of alleged electronic communications at the Disciplinary Hearing. The Hearing Panel sustained Mr. Krigel's objection but the exhibits were taken and recorded with the case pursuant to Mo.R. Civ.P. 73.01(a). Informant included a copy of the exhibits as part of the record and included substantive arguments about the exhibits in its brief. Mr. Krigel continues to object to the admission and use of the exhibits. The original messages were never preserved and the exhibits constitute a summary of birth father's transcriptions of partial and incomplete messages. They do not even represent entire conversations but simply statements or comments "cherry picked" by birth father. Nothing in the exhibits reference the phone number of origin or the name of the person who sent the message. Mr. Krigel objected on the grounds of authenticity, foundation, and improper summary document. (S.App at A58-A61)[DHT at 68-77]. The exhibit was also irrelevant in that no foundation existed that Mr. Krigel knew of the conversations until the discovery process in the adoption case. Mr. Krigel asks this Court to sustain his objection and exclude the exhibits as evidence in this case.

Birth mother gave birth to a live child in early April, 2010. Mr. Krigel, on behalf of his client, filed a Petition to Approve Consent and Temporary Custody in preparation of a hearing for the birth mother to consent to terminate her parental rights. Mr. Krigel went over the consent form with birth mother. The hearing to approve birth mother's consent was held on April 6, 2010 before Commissioner Merrigan, 16th Judicial Circuit, Kansas City. The court appointed a guardian ad litem to represent the child at the hearing. Ms. Merryfield, the court appointed social worker, filed a birth mother assessment with the court. That document was filed directly with the court and offered into evidence during the court proceeding. (S.App at A115; S.R. at 360, Ex 21). That report contained detailed information about birth father, his address, phone number, his education and his employment; it described birth father's family history and a discussion of the birth parents' relationship. (S.App at A141; S.R. at 360, Ex 21). The Report further stated, "[a]t this point (birth mother) [sic] is unsure of (birth father's) [sic] plans and believes that (birth father's) [sic] mother is pushing him to parent the baby. It is unknown whether he will contest adoption." (S.R. at 363, Ex 21) (emphasis added). Present at the hearing was the guardian ad litem, birth mother, birth mother's mother, Ms. Merryfield, Mr. Belfonte and Mr. Krigel. Mr. Krigel did not provide notice of the hearing to approve birth mother's consent to terminate her parental rights to birth father because no such notice was required by law. Further birth father neither

registered with the Putative Father Registry nor filed a petition for paternity. (S.App at A106).

Mr. Krigel offered the testimony of the birth mother at the hearing. At the beginning of the hearing, Mr. Krigel advised Commissioner Merrigan of the legal strategy employed in the case.

Q. Okay. And I've had an opportunity to meet with both your mother and your father. You and I have had a bunch of telephone conversations.

A. Yes we have.

Q. And I know we had a lengthy meeting in my office, is that right?

A. Yes.

Q. And the reason we met several weeks before the child was born was because we were concerned what actions if any the biological father of the child may have, what he may or may not do with respect to this adoption, is that correct?

A. Yes.

Q. And what is his name?

A. (birth father) [sic]

Q. Okay. And we've talked about (birth father) [sic] at some length; have we not?

A. Yes.

Q. And while there will be further evidence presented later today by the prospective adoptive parents, we're of the opinion that while (birth father) [sic] may not consent to this adoption, we're of the belief that there's a high real likelihood that he may not actively pursue any opposition to this adoption?

A. Yes.

Q. And that is the strategy that you and I and your parents and later Mr. Belfonte, have adopted.

A. Yes.

(S.App at 220-22) (emphasis added). Mr. Krigel believed he fully informed Commissioner Merrigan of the legal strategy.

> We always told Commissioner Merrigan that and all the other Commissioners. They completely understand the way the Putative Father Registry works, they understand that it's the father's obligation to affirmatively assert his paternity, and they're very well aware that there is an at-risk situation, especially for the prospective adoptive parents because they're taking custody of a child before the statutory time has elapsed and courts are reluctant to do that unless the parties feel there's

a likelihood that, in this case, birth father wasn't going to actively contest the adoption going further.

(S.App at A140)[DHT at 392].

Mr. Krigel asked statutorily required questions during the hearing. These questions addressed whether birth mother had ever advised birth father that she was not pregnant, that the pregnancy had been terminated, or that the child had passed away. He also asked birth mother the following:

Q. And you understand, admittedly, the somewhat complicated strategy that we have used in moving forward?

A. Yes.

Q. Now (birth father) [sic] has been consulted at length about this matter, has he not?

A. Yes.

Q. You and Ms. Merryfield have met with him on at least one occasion. Has it been more than once?

A. Just once.

Q. Just once. And even though you have talked to him and his family at some length, he has not stepped forward

* * * *

Q. Even though he has been consulted, he has never stepped forward since the birth of the child claiming any rights to the child?

A. No.

Q. And you're of the belief there's a high likelihood that he may not do anything; is that correct?

A. Yes.

(S.App. at A225-A227). These questions were consistent with those normally asked in such proceedings (S.App at A158) [DHT at 461-463].Mr. Krigel, when asked to explain the context of his question before the Hearing Panel, stated as follows:

Q. At that moment did you possess in your file any tangible evidence that would corroborate that statement by your client.

A. Tangible evidence, I probably had notes saying that she had consulted with (birth father) [sic] at length about the pregnancy, yes, (birth father) [sic] and her had been living together most of the prior nine months; that (birth father) [sic] knew she was pregnant, knew she wanted to go forward with the adoption, so yeah, I had all kinds of notes and records and conversations about that.

Q. But (birth father) [sic] had not been consulted about this proceeding itself, or any kind of consent to termination of parental rights?

A. What (birth father) [sic] had been consulted about was the pregnancy, and the fact that she hadn't concealed the pregnancy, lied about the pregnancy, said the baby had died during birth or that she aborted the child. That's what we are referring to. Commissioner Merrigan knew that. I've done this hundreds of times in front of Commissioner Merrigan.

Q. So you're just asking her if there had been a consultation about the fact of a pregnancy?

A. Yes. About her situation, the fact that she had been pregnant.

Q. And the fact that you asked her if (birth father) [sic] had been consulted at length, what were you trying to get at there as far as not really much to discuss about whether someone is pregnant or not, they either are or they aren't?

A. What I was trying to show is that he had known about it for a long, long time. Maybe not from the moment following conception, but certainly within a few months of conception. He knew that she was pregnant and was living with her. They actively concealed it. Didn't tell their parents until the 11th hour, until about a month before the baby was born. (Birth father) [sic] knew what was going on. This

wasn't something we were doing that (birth father) [sic] wasn't fully aware of.

Q. Why didn't you ask her does (birth father) [sic] know if you're pregnant and if so how long has he known? Why did you ask her (birth father) [sic] has been consulted at length about this matter?

A. You know, are you saying my question was not very artful, I would accept that as perhaps a valid criticism but this is something—I think I asked the right question under the right circumstances. Commissioner knew what I was talking about. She knows that birth fathers aren't advised about consent hearings. You just don't do that.

(S.App at A107-A108). Mr. Krigel believed that his question posed to birth mother addressed birth father's knowledge regarding the pregnancy, that birth father had been consulted regarding birth mother's pregnancy and that the context of his question was understood by Commissioner Merrigan.

Informant's counsel asked Mr. Krigel at the Disciplinary Hearing to explain the context of the question regarding birth father not stepping forward since the birth of the child to claim any rights to the child. The exchange was as follows:

Q. Does your question presuppose that the father was aware of the birth of the child?

A. No, what I was trying to show is that, you know, we already started into the 15-day period that's required under the Putative Father Registry and that we were admittedly only three days into it but he hadn't done anything yet. Commissioner would not have permitted this to go forward if the father had done the things he was supposed to do.

(S.App. at A267)[DHT at 267].

Mr. Krigel asked birth mother at the hearing to Approve Consent and Temporary Custody whether there had been any attempt on birth mother's part to defraud or mislead anyone in the matter. Birth mother responded in the negative. (S.App at A226). Based upon the information learned much later, birth mother testified falsely. However Mr. Krigel was unaware of birth mother's conduct and the falsity of her statement when he asked the question and received the response. Mr. Krigel testified before the Disciplinary Hearing Panel that if he had known his client was lying he would not have put her on the stand and would have told her to get another lawyer. Mr. Krigel did not counsel or assist the birth mother to testify falsely. (S.App at A142; A149)[DHT at 398-99; 427]. Mr. Krigel expressed regret to the Disciplinary Hearing Panel that he had failed to detect his client's untruthfulness; that he didn't spend more time with his client and give her more

attention which might have aided him in detecting her conduct. (S.App at 151)[DHT at 433-34].

During the proceeding before the Disciplinary Hearing Panel, Mr. Krigel was asked whether he verified his client's information by checking her text messages, emails or Facebook. Mr. Krigel stated that he did not. (S.App at A110)[DHT at 275. Mr. Krigel testified that it was not his practice to ask his clients for their cell phones to review their text messages or to ask clients to print out their emails so that he would know what email communications they were having with others. (S.App at A137)[DHT at 379] He also had never looked at clients' Facebook sites to see what they were posting on Facebook. (S.App at A137)[DHT at 379].

Ms. Merryfield also testified at the April 6th hearing to approve birth mother's consent. At the hearing she testified that she had heard birth mother's testimony and that she believed it accurate and truthful to the best of her knowledge. (S.App at A230). Ms. Merryfield told the Hearing Panel that she never had any concerns about the birth mother's veracity as she counseled her, prepared the assessment or testified at the April 6, 2010 hearing. She subsequently learned, much later, of facts provided by birth mother that were not truthful. (S.App at A174)[DHT at 526-27].

At the conclusion of the hearing to Approve Consent and Temporary Custody, Commissioner Merrigan found that birth mother's consent was freely, voluntarily and knowingly given, and therefore accepted by the court. (S.App. at A234).

Following the hearing to Approve Consent, Commissioner Merrigan took up the prospective adoptive parents' Petition for Transfer of Custody and Adoption.[8] Mr. Krigel's client was not a party in that case, Mr. Krigel did not appear, and the case had a different case number than that of the Petition to Approve Consent and

[8] Mr. Krigel objected on grounds of relevancy and hearsay to the admission of Ex. 7, pages 17-32 (S.R. at 268), the second hearing held on April 6, 2010 related to the adoption proceedings. Mr. Krigel's client was not a party to that proceeding and he, himself, did not appear for any purpose at that hearing. The adoption proceeding was a separate action from the hearing to approve birth mother's consent. (S.App at A129)[DHT at 346]. In fact, the transcript of the hearing on the Petition to Transfer and Adoption reflects Mr. Krigel was not present at the hearing. Therefore he would have no personal knowledge of the testimony and had no access to a transcript. Despite those facts, the Informant persists on offering the transcript as evidence against Mr. Krigel. The Hearing Panel sustained the objection. (S.App at A 105-A106; A109)[DHT at 251-57, 269-70]. Mr. Krigel asks this Court to sustain the objection and not use the April 6, 2010 as substantive evidence as to Mr. Krigel's alleged knowledge for purposes of *de novo* review.

Temporary Custody. (S.App at A104-A106)[DHT at 251-257]. Mr. Krigel believed that following the April 6, 2010 hearing to approve birth mother's consent that his representation of birth mother had concluded. (S.App at A142; A177)[DHT at 399; 537]. Mr. Belfonte represented the prospective adoptive parents in the adoption case. Mr. Krigel did not tell Mr. Belfonte how to handle his case and did not direct him. (S.App at A138; A174; A176)[DHT at 383-84; 531; 535]. Mr. Belfonte prepared and filed the Petition for Transfer of Custody and Adoption. At the time he filed the petition he knew that the biological father had not consented to the adoption. (S.App at A175-A176)[DHT at 532-33]. As the attorney for the prospective adoptive parents, Mr. Belfonte would have been responsible for serving the putative father with a copy of the adoption petition prior to the finalization of the adoption. (S.App at A157)[DHT at 458].

BIRTH FATHER FILES PATERNITY ACTION AND INTERVENES IN ADOPTION

Sometime in early May, 2010, birth father learned that birth mother had delivered a child. (S.App at A74)[DHT at 130]. Birth father contacted Mr. Zimmerman who referred him to an attorney by the name of Mike Whitsitt. (S.App at A74)[DHT at 130]. Mr. Whitsitt immediately had birth father register with the Missouri Putative Father Registry. (S.App at A74)[DHT at 132]. Mr. Whitsitt also took action to prepare a Petition for Paternity to file in Jackson County Circuit

Court. (S.App at A74)[DHT at 132]. However, even in May, 2010, birth father still asked for paternity testing because while he was "pretty sure," he was not 100 percent sure that he was the father. (S.App at A74)[DHT at 131].

Birth father advised his attorneys that he had known that the birth mother was pregnant in late 2009 and that the original due date was April 8, 2010. After discussing these facts with his attorneys, the attorneys filed, on his behalf, pleadings claiming that the birth was concealed from him. Birth father acknowledged that the pleadings were filed in order to seek a ruling by the trial court of fraud to permit him to intervene in the adoption and to require his consent. Otherwise, he was out of time to withhold his consent to the adoption. (S.App at A75)[DHT at 135-36]. Birth father conceded at the Disciplinary Hearing that no one, at any time, stopped or prevented him from registering on the Missouri Putative Father Registry or from filing a paternity action. (S.App at A70)[DHT at 115]. He always had the right to file a paternity action or file on the Putative Father Registry no matter what anyone did, including Mr. Krigel. (S.App. at A143)[DHT at 405].

Both birth father and the prospective adoptive parents took changes of judge from the Jackson County Family Court Commissioners. (S.R. at 325-326; 328). The case was assigned to the Jackson County Family Court administrative judge. That court permitted birth father to intervene in the adoption proceeding and

consolidated birth father's paternity action with the adoption case. The trial court ruled that birth mother had consented to the termination of her parental rights and therefore could not participate as a party in the paternity action and adoption proceeding. (S. App at A19; A122; A142)[DHT at 309-310; 321-323; 400]. The judge did permit both birth mother and Mr. Krigel to observe the proceedings. (S. App at A119)[DHT at 310]. Despite this, substantial discovery was served upon birth mother and she was deposed. In addition, she testified during the consolidated proceedings. (S. App at A142)[DHT at 399-400]. Throughout that process, Mr. Krigel's office continued to represent birth mother through the extensive discovery process.

Ultimately the trial court found that birth father was the biological father of the minor child, granted his paternity action and found in favor of birth father and against the prospective adoptive parents in the adoption proceeding. (S.R. at 317). Notwithstanding the fact that Mr. Krigel was neither a party to the case nor an attorney representing a party in the case, the court made certain findings as to Mr. Krigel's conduct although the trial court held no independent hearing on the alleged ethics violations, did not permit Mr. Krigel to present evidence or cross-examine witnesses regarding the allegations, and did not permit Mr. Krigel to make any arguments or present any evidence as to his use of a passive legal strategy. Mr. Krigel objected, during the Disciplinary Hearing, to the findings

made by the trial court as to his strategy or his conduct representing birth mother, as well as to the admission of Ex. 2, the Judgment in the adoption hearing, and Ex. 17, the Judgment in the paternity case. (S. App at A64) [DHT at 90-92] In particular, Mr. Krigel argued that the Judgments may be entered into evidence in a subsequent proceeding for the limited purpose of demonstrating that a judgment was entered or that a court took certain action, but may not be offered for the truth of the findings related to his alleged conduct. *State v. Clevenger*, 289 S.W. 3d 626 (Mo. App 2009); *S.F.M.D. v. F.D. and R.R.*, WL 5139487 (Mo. App. W.D. Oct. 14, 2014); Mo. Rev. Stat. § 490.130. Further that because Mr. Krigel was not a party in the underlying proceedings, collateral estoppel and res judicata do not apply. *See generally King General Contractors, Inc. v. Reorganized Church*, 821 S.W. 2d 495, 501 (Mo. banc 1991). Lastly that the admission of Ex. 12 and 17 constituted a violation of Mr. Krigel's rights to due process and fair trial as required by Missouri and federal constitutions. *In re Carey*, 89 S.W. 3d 477, 499 (Mo. banc 2002) (federal court's findings as to ethical violations did not violate due process when the attorneys had a full and fair opportunity to litigate the alleged conduct). (S.App at A64; A67)[DHT at 90-92; 101-103]. The Disciplinary Hearing Panel overruled Mr. Krigel's objection.

In its Findings of Fact and Conclusions of Law, the Hearing Panel listed 49 Findings of Fact. (S.App. at A376-A384). The final finding of fact of the Panel

reflects that it reached its decision independent of the findings of the trial court as set forth in the May 6, 2011 Judgment. (S.App. at A383). Notwithstanding its statement that it reached its decision independent of the findings of the trial court, the Hearing Panel essentially adopted the trial court's findings.

PROFESSOR BECK'S TESTIMONY

Mary M. Beck, a professor at the University of Missouri School of Law in the areas of domestic violence, adoption, surrogacy and guardianship, testified before the Hearing Panel. Her testimony was offered to (1) assist the triers of fact in an area of law in which the Disciplinary Hearing Panel members had no expertise and (2) to support Mr. Krigel's claim that he did not knowingly or intentionally violate the Missouri Rules of Professional Conduct by implementing a legal strategy which he believed was consistent with Missouri law. Professor Beck had served on Missouri Bar special committees on adoption issues, taught at the Missouri Judicial College on issues related to the Missouri Putative Father Registry and adoption, and had assisted several states, including Missouri, as well as the United States Congress, in the development of putative father registries. (S.App at A153)[DHT at 441-44].

Professor Beck testified before the Hearing Panel as to the line of cases in both the United States Supreme Court and the Missouri Supreme Court that recognized certain constitutionally protected rights for putative fathers. (S.App at

A154)[DHT at 445-46]. In response to a question regarding the constitutionally protected rights of putative fathers, Professor Beck testified as follows:

> Well, nonmartial birth father law in adoption is counterintuitive in that it contradicts most of what we teach in law school about due process notice and opportunity to be heard. And it is informed mostly by U.S. Supreme Court juris prudence in this area. And so the constitutional rights are out of a case, Lehr vs. Robertson decided in 1983 that basically says a nonmarital birth father's rights are commensurate with the efforts he has made to establish a significant personal and custodial and financial relationship with his child. And that is echoed in Missouri state law as well as Missouri Supreme Court decisions.

(S.App at A154)[DHT at 446].

Professor Beck described how § 453.061 operated to protect birth mothers and to relieve them of an obligation to notify a man of pregnancy, due date or adoption. (S.App at A154)[DHT at 447-48]. She testified that under Missouri law, the birth mother did not have an affirmative duty to provide any information to the birth father of pregnancy, due date or a birth. (S.App at A154)[DHT at 445]. The Missouri Putative Father Registry, § 192.016 however protected a prospective birth father by permitting him to file, pre-birth, on the registry in order to ensure the

father notice of any proceedings involving the child and to protect his right to consent. (S.App at A155)[DHT at 449-50]. The registry protected the putative father by ensuring that nothing the birth mother did impeded a father from filing a paternity action or registering on the registry. (S.App at A155)[DHT at 449]. The law gave the putative father the "keys" to protecting his rights by registering on the registry and/or by filing a paternity action. (S.App at A156)[DHT at 453-54].

Professor Beck testified that based on her background and experience, it was common for Missouri practitioners who represented birth mothers, who wished to consent to the termination of their parental rights and transfer custody, to utilize a plan to "wait and see" whether the biological father would affirmatively protect his rights. (S.App at A157)[DHT at 458-59]. Professor Beck opined that such a strategy was reasonable and within the ordinary practice of the adoption attorneys in Missouri. (S.App at A157)[DHT at 460]. Likewise she testified upon inquiry from a member of the panel that it is appropriate for a birth mother's attorney to advise the birth mother that it would be in her best interests not to communicate with the birth father. (S.App at A160)[DHT at 469-70]. After reviewing the transcript, she testified that there was nothing unusual about Mr. Krigel's questions and that they were consistent with those normally asked in such proceedings. (S. App at A158)[DHT at 461-463].

THE INFORMATION AND DECISION BY THE HEARING PANEL

The Hearing Panel gave no reason as to why it ignored Professor Beck's expert testimony. In its Findings of Fact and Conclusions of Law the Hearing Panel made no reference to Professor Beck's testimony at all. (S.App at A377-A385).

Informant alleged eight allegations of disciplinary violations. They were:

(1) that in connection with the proceedings for termination of the mother's parental rights, Mr. Krigel knowingly offered false evidence to a tribunal or alternatively, did not take reasonable remedial measures upon becoming aware of the false evidence in violation of Rule 4-3.3(a)(3), (b) and (d);

(2) that Mr. Krigel unlawfully obstructed the father's access to evidence, including the facts and circumstances regarding the birth, termination of parental rights, transfer of custody and adoption proceedings, and Respondent unlawfully concealed documents, in violation of Rule 4-3.4(a);

(3) that Mr. Krigel counseled and assisted the birth mother to testify falsely, in violation of Rule 4-3.4(b);

(4) that Mr. Krigel requested that the adoption agency owner and the prospective adoptive parents refrain from voluntarily giving relevant information to the biological father in violation of Rule 4-3.4(f);

(5) that Mr. Krigel knowingly made a false statement of material fact to the father's attorney by stating that there would be no adoption in violation of Rule 4-4.1(a) and otherwise failed to disclose material facts to the father's attorney in violation of Rule 4-4.1(b);

(6) that Mr. Krigel used means that had no purpose other than to delay the ability of biological father to assert paternity in violation of Rule 4-4.4(a);

(7) that engaged in conduct that was prejudicial to the administration of justice in violation of Rule 4-8.4(d); and

(8) that Mr. Krigel engaged in conduct involving dishonesty, fraud, deceit and misrepresentation in violation of Rule 4-8.4 (c).

(S. App. at 377-385).

Following the conclusion of the hearing, the Hearing Panel entered its Findings of Fact and Conclusions of Law. The Hearing Panel found in Mr. Krigel's favor with respect to two of the three allegations in item (1) above and completely in Mr. Krigel's favor with respect to items (2), (3), (4) and (8) above. The Hearing Panel found that M. Krigel did not violate Rule 4-3.3(b) or (d) in connection to the subject proceedings; that Mr. Krigel did not unlawfully obstructed birth father's access to evidence pursuant to Rule 4-.3.4(a); that he did not counsel and assist birth mother to testify falsely in violation of Rule 4-3.4(b);

that he did not ask Ms. Merryfield and the prospective adoptive parents to refrain from voluntarily giving birth father relevant information contrary to Rule 4-3.4(f); and that Mr. Krigel did not engage in conduct involving dishonesty, fraud or deceit in violation of Rule 4-8.4(c). (S. App. at A383-A384).

However the Disciplinary Hearing Panel implicitly concluded that Mr. Krigel's legal strategy wherein he took a "wait and see" approach or a "passive" strategy was contrary to Missouri law. Therefore the panel found that Mr. Krigel employed the strategy for the express purpose of impairing birth father's ability to establish parental rights and that it served no substantial purpose other than to impair and delay birth father's assertion of his parental rights in violation of Rule 4-4.4(a); that during the examination of birth mother at the April 6, 2010 hearing, Mr. Krigel asked questions designed to elicit answers designed to misrepresent the facts as known by Mr. Krigel that served to mislead the Court in violation of 4-3.3(a)(3); that Mr. Krigel's alleged statement to Mr. Zimmerman that there would be no adoption without the father's consent violated Rule 4-4.1(a); and that the strategy of actively doing nothing, his statement to Mr. Zimmerman and his conduct at the April 6, 2010 hearing constituted conduct prejudicial to the administration of justice in violation of Rule 4-8.4(d). (S. App. at A383-A384).

Mr. Krigel has denied all allegations contained in the Petition. He believed that the strategy he employed was consistent with Missouri law. He further has

denied offering false evidence to Commissioner Merrigan or making a material false statement to Mr. Zimmerman. He therefore respectfully seeks review by this Honorable Court of the ethical violations found by the Disciplinary Hearing Panel pursuant to Missouri Supreme Court Rule 5.19(d). Therefore this case now stands before this Court.

POINTS RELIED ON

POINT I

MR. KRIGEL DID NOT VIOLATE PROFESSIONAL RULES OF CONDUCT 4-3(a)(3), 4-4.1(a), 4-4.4(a) or 4-8.4(d) IN THAT IN ASSISTING HIS CLIENT WITH A LEGITIMATE LEGAL OBJECTIVE, HE UTILIZED A STRATEGY SUPPORTED BY MISSOURI LAW, DID NOT KNOWINGLY OFFER FALSE TESTIMONY TO A COURT OR ENGAGE IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OR JUSTICE, AND DID NOT MAKE A MATERIAL FALSE STATEMENT TO MR. ZIMMERMAN.

In re Crews, 159 S.W. 3d 355, 358 (Mo. banc 2005).

In the Interest of J.F., 719 S.W. 2d 790, 792 (Mo. banc 1986)

State ex rel. T.A.B. v. Corrigan, 500 S.W. 2d 87, 94 (Mo. App. 1980)

See J.R.M. v. S.L.M., 54 S.W. 3d 711, 715 (Mo. App. 2002)

Missouri Revised Statute § 192.016

Missouri Revised Statute § 210.822

Missouri Revised Statute § 210.826

Missouri Rules of Professional Conduct 4-1.0(f)

Missouri Rules of Professional Conduct 4-1.2(a)

Missouri Rules of Professional Conduct 4-3.3(a)(3).

Missouri Rules of Professional Conduct 4-4.1(a).

Missouri Rules of Professional Conduct 4.4(a)

Missouri Rules of Professional Conduct 4-8.4(d)

POINT II

MR. KRIGEL'S CONDUCT DOES NOT WARRANT SANCTIONS AS ARGUED BY INFORMANT.

In re Mirabile, 975 S. W. 2d 936, 939 (Mo. banc 1998)

In re Oberhellman, 873 S.W. 2d 851 (Mo. banc 1994)

In re Storment, 873 S. W. 2d 227 (Mo. banc 1994)

In re Ver Dught, 825 S.W. 2d 847 (Mo. banc 1992)

ABA Standards for Imposing Lawyer Sanctions (1991 ed)

ARGUMENT

POINT I

MR. KRIGEL DID NOT VIOLATE PROFESSIONAL RULES OF CONDUCT 4-3(a)(3), 4-4.1(a), 4-4.4(a) or 4-8.4(d) IN THAT IN ASSISTING HIS CLIENT WITH A LEGITIMATE LEGAL OBJECTIVE, HE UTILIZED A STRATEGY SUPPORTED BY MISSOURI LAW, DID NOT KNOWINGLY OFFER FALSE TESTIMONY TO A COURT OR ENGAGE IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OR JUSTICE, AND DID NOT MAKE A MATERIAL FALSE STATEMENT TO MR. ZIMMERMAN.

A. STANDARD OF REVIEW

"Professional misconduct must be proven by a preponderance of the evidence before discipline will be imposed." *In re Crews*, 159 S.W. 3d 355, 358 (Mo. banc 2005). This Court reviews the evidence *de novo*, independently determining all issues pertaining to credibility of witnesses and the weight of the evidence and drawing its own conclusions. *In re Beltz*, 258 S.W. 3d 38, 41 (Mo. banc 2008). The Panel's findings of fact, conclusions of law and the recommendations are advisory and this Court may reject any or all of the Panel's recommendations. *In re Coleman*, 295 S.W. 3d 857, 863 (Mo. banc 2009). *See also* Rule 5.15 (c) (establishing preponderance of evidence standard and placing

burden of proof on Informant); Rule 5.16(g) (decision of hearing panel "shall not have any binding or limiting effect on the Court").

B. INTRODUCTION

1. Missouri Substantive Law Impacts the Application of the Rules of Professional Conduct

The crux of Informant's allegations against Mr. Krigel is that he designed the "passive" or "wait and see" strategy employed by him on behalf of his client simply to prevent or impair birth father from being able to assert his parental rights. Three of the four findings of ethical misconduct by the Disciplinary Hearing Panel are premised on the wrongfulness of the strategy. The Informant's rationale for its claims of ethical violations by Mr. Krigel hinge on a misinterpretation regarding the rights of not only putative fathers but the rights of biological mothers. Thus the substantive law that governs the rights of biological parents necessarily implicate the application of the Rules of Professional Conduct not only as to Mr. Krigel in this case but as to all other attorneys that practice such law in the State of Missouri. This is particularly true because, as Informant acknowledges, the "passive" strategy utilized by Mr. Krigel in this case "is not unique amongst Missouri attorneys who practice in this area of law." Informant's Brief at 34. Mr. Krigel believed that he understood the substantive law in Missouri as it pertained to putative fathers and biological mothers; that the legal strategy he employed

when representing the birth mother was consistent with Missouri law. Therefore Mr. Krigel's actions, including his utilization of a "passive" or "wait and see" strategy, must be evaluated in the context of the controlling substantive law. When evaluated in such a light, not only did Mr. Krigel comply with his ethical obligations but could not have knowingly or intentionally violated the Rules of Professional Conduct.

The Informant's arguments in its brief do not specifically address the governing law. Rather the Informant glosses over such issues to persist in its claim that Mr. Krigel violated the Rules of Professional Conduct. The Informant's failure to understand or apply Missouri substantive law pervades its brief and is demonstrated by statements or arguments such as: (1) that unless notified by Mr. Krigel or one of its participants, birth father would not have received notice of any proceedings involving the minor child, Informant's Brief at 17; (2) that the birth mother and/or Mr. Krigel had an obligation to notify birth father of the birth of the child, Informant's Brief at 19, 22; (3) that Mr. Krigel had an obligation to contact Mr. Zimmerman regarding the birth of the child, Informant's Brief at 22; (4) that birth father did not have a specific opportunity to tell his position to any government agency, social worker or judge, Informant's Brief at 58; (5) that birth father was not invited to the hospital to see the child after birth, Informant's Brief

at 58; and (6) that Mr. Krigel's conduct prevented birth father from asserting his parental rights. Informant's Brief at 61.

Informant's erroneous arguments misapply the Rules of Professional Conduct and place on Mr. Krigel a duty to the birth father that does not exist. Mr. Krigel's duty was to the birth mother. He did not represent birth father. Mr. Krigel's ethical duty was to zealously represent birth mother. In the underlying case, the birth parents' goals were opposite. The birth father did not want to consent to an adoption. The birth mother wanted to place the child in a stable and permanent two parent home through the adoption process. If Mr. Krigel had assisted birth father in furthering his goal, Mr. Krigel would have violated his ethical duty to his client, the birth mother.

2. **Under Missouri Law a Putative Father Must Take Affirmative Steps to Protect His Constitutional Parental Rights**

Section 453.061 of the Missouri Revised Statutes holds that "[a]ny man who has engaged in sexual intercourse with a woman is deemed to be on notice that a child may be conceived and as a result is entitled to notice of an adoption proceeding only as provided in this chapter." A putative father is a man whose legal relationship to a child has not been established but who claims to be the father or who is alleged to be the father of a child who is born to a woman to whom his is not married at the time the child is born. Missouri adoption statutes

specifically define a putative father as "the alleged or presumed father of a child including a person who has filed a notice of intent to claim paternity with the putative father registry . . . ." § 453.015(3) RSMo. Legally, a putative father is not considered a "parent" unless he takes certain affirmative action recognized by statute. *See J.R.M. v. S.L.M.*, 54 S.W. 3d 711, 715 (Mo. App. 2002) ("§453.015(2) in defining "parent" provides that '[t]he putative father shall have no legal relationship unless he has acknowledged the child as his own by affirmatively asserting his paternity.'").

Both the United States Supreme Court and this Court have examined the extent to which a natural father's biological relationship affords him due process protections. *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quillion v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v.* Robertson, 463 U.S. 248 (1983). This Court followed the holding and reasoning of *Stanley* in *In the Interest of J.F.*, 719 S.W. 2d 790, 792 (Mo. banc 1986) in concluding that the failure to provide notice to a putative father who had not affirmatively asserted his parental rights was not arbitrary and did not violate due process of law. *See also State ex rel. T.A.B. v. Corrigan*, 500 S.W. 2d 87, 94 (Mo. App. 1980) (Missouri law provides that a putative father is not defined as a "parent" and does not acquire a legal relationship to his illegitimate child unless he acknowledges the child by affirmatively asserting his paternity).

The Missouri Legislature has adopted a statutory scheme to protect both putative fathers and birth mothers consistent with constitutional dictates. The provisions of Chapter 211 of the Missouri Revised Statutes, which govern the termination of parental rights, requires a court to consider and protect the interests of both the child and the constitutional rights of all parties. *See* § 211.443 RSMo. However Chapter 453, which governs adoptions, requires that the law be construed "to promote the best interests and welfare of the child in recognition of the entitlement of the child to a permanent and stable home." *In re Adoption of R.A.B.*, 562 S.W. 2d 356, 360 (Mo. banc 1978). In order to balance a child's need for permanency with a father's rights to parentage, the Legislature established the Putative Father Registry which provides the means by which a putative father can assert his parental rights and insure that he is notified of any adoption petition or proceeding. *See* § 192.016 RSMo. The registry permits any person, prior to or after the birth of a child born out of wedlock, to file a notice of intent to claim paternity of a child. Likewise a putative father may file a petition asking the court to establish his "parent-child" relationship under the Uniform Parentage Act. *See* § 210.826. Section 210.822 RSMo. provides for a presumption of paternity, which is rebuttable, under certain circumstances. Those circumstances include that the putative father has filed an acknowledgment of paternity with the Bureau of Vital Records pursuant to § 210.823 RSMo.; with his consent, the man is named as the

father on the child's birth certificate; that he is obligated to support the child through a court order or a voluntary written promise; or through testing that demonstrates he is the father. The Missouri Legislature has guaranteed notice of an adoption proceeding to a putative father if he files a paternity action or acknowledges paternity pursuant to § 453.060. In *T.A.B. v. Corrigan*, 500 S.W. 2d at 88-89, the appellate court held that a putative father is entitled to notice of adoption proceedings only if he acknowledges his child by affirmatively asserting his paternity. Significantly, there is no case law or statute in Missouri which places a duty or obligation on the biological mother to affirmatively advise the putative father of a conception date, a pregnancy, or the birth date of the child.

In this case, birth father knew about the pregnancy for eight months but took no action to protect his parental rights. Birth father knew and understood that birth mother, from the moment they terminated their relationship at approximately the eighth month of her pregnancy, expressed her intent to place the child for adoption. Yet despite this knowledge, he failed to affirmatively take steps to assert his parental rights as required by Missouri law by filing on the Putative Father Registry or filing a petition of paternity. In fact, contrary to taking affirmative steps to assert his paternity, he took exactly the opposite tact. He equivocated as to whether he was the father and sought confirmation through DNA testing.

It is under this backdrop that Mr. Krigel's use of a passive strategy must be evaluated. When considered in light of Missouri's substantive law, that strategy comported with the requirements of Missouri law. The birth mother's objective was to place her child for adoption because she believed that the adoption was in the best interests of the child. This objective was not contrary to Missouri law. Under Rule 4-1.2(a), Scope of Representation, "a lawyer shall abide by a client's decisions concerning the objectives of representation" subject to the lawyer not counseling a client to engage, or to assist a client in conduct that is criminal or fraudulent. Comment 1 to Rule 4-1.2 states that "[t]he client has ultimate authority to determine the purposes to be served by legal representation within the limits imposed by law and the lawyers' professional obligations." The client has a right to consult with the lawyer about the means to be used in pursuing those objectives. *Id*. It was proper for Mr. Krigel, in the course of his representation, to explain Missouri law applicable to the birth mother's objectives. *See* Rule 4-8.4, Misconduct, Comment 1 ("Rule 4-8.4(a) . . .does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.") It was his obligation to advise her of the lawful course of action he believed was most likely to accomplish those objectives. He recommended to his client that she take no affirmative action but rather wait and see whether birth father would take those steps necessary to require his consent to adoption or notice of any proceedings.

Birth father took no such steps and therefore Mr. Krigel proceeded accordingly under Missouri law. Such strategy, consistent with Missouri law, cannot form the basis of a charge that the strategy had no substantial purpose other than to impair birth father's ability to assert parental rights or that the conduct was prejudicial to the administration of justice.

C. MR. KRIGEL DID NOT VIOLATE RULE 4-3.3(a)(3), CANDOR TO TRIBUNAL

4-3.3(a)(3). Candor Toward the Tribunal provides in relevant part

(a) A lawyer shall not knowingly:

(3) offer evidence that the lawyer knows to be false.

4-1.0(f) defines "knowingly" as "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Mr. Krigel respectfully states to this Court that he did not knowingly offer false evidence to Commissioner Merrigan during the April 6, 2010 hearing to Approve Consent and Temporary Custody.

Informant claims that Mr. Krigel conducted questioning that was misleading because it was "intended to present to the Court the incorrect impression that birth father was not interested in the birth of the child or in asserting his parental rights, when [Mr. Krigel] knew that was not the case." This claim is utterly unsupported by the evidence.

Mr. Krigel disclosed to the court from the beginning that, because the birth father and his family had expressed some opposition to the adoption, he was utilizing the passive, wait and see strategy. (S.R. at 274, April 6, 2010 hearing). The Commissioner understood the strategy being used since, as Professor Mary Beck testified, that strategy is the "normal practice" for attorneys faced with a birth father who has expressed opposition to the adoption but has not filed with the Putative Father Registry. Mr. Krigel disclosed to the Court that there was a risk that the birth father might still take the necessary steps to stop the adoption before the fifteen-day deadline expired. The Commissioner expressed her awareness of that risk in the subsequent Petition to Transfer and Adoption hearing held on the same day, when she stated, "And I hope this will not end up being contested. So we will just keep it in our prayers." (S.R. at 300).

As the April 6, 2010 hearing transcript shows, the birth mother testified, in response to questions from Mr. Krigel, that she believed that, even though the birth father had not consented to the adoption, there was a "high real likelihood that he may not actively pursue any opposition to this adoption." Based on what Mr. Krigel knew at that time, he quite reasonably believed that this testimony was accurate—that it was unlikely that the birth father would "actively pursue any opposition" to the adoption. Perhaps the most significant basis for that belief was the fact that the birth father had not filed with the Putative Father Registry, had not

filed a Petition for Paternity Determination and had taken none of the other steps needed to prevent the adoption from occurring.

- He had not done so even though the birth mother had repeatedly told the birth father that she intended to pursue adoption. She did so during the contentious family meeting. She did so during the mediation session with Ms. Merryfield. The birth father knew that birth mother had hired a lawyer.
- He had not registered with the Putative Father Registry even though he had known about the pregnancy for months and been informed that the baby's original due date was around April 8, which was only two days after the hearing was held (Of course, Mr. Krigel was not aware, at the time of the hearing, that his client had subsequently lied to the birth father that the due date had been extended.)
- He had not registered even though he had a lawyer to advise him of the steps he needed to take.

Mr. Krigel's belief was also reasonable in light of his experience and knowledge in the adoption field. He knew that the vast majority of birth fathers who initially express opposition to adoption do not actively take steps to stop the adoption. As Professor Mary Beck testified, it is "very common" for a birth father to "indicate that he won't consent to an adoption but not take any affirmative steps to protect his rights" and "very few" fathers file with the Putative Father Registry.

Likewise Ms. Merryfield testified that "[a]lot of fathers will say I don't want an adoption. That is very common, very common. Very few stop an adoption." His belief was reasonable in light of the fact that the birth mother and her parents (who had known the birth father for some time) both believed that he would not take such steps.

To understand the questioning during the April 6 Approval of Consent Hearing it is important to understand the function of that hearing. The issue before the Commissioner in such a hearing is whether the birth mother's decision to irrevocably relinquish her parental rights is being made voluntarily and with knowledge of risks of that decision and whether it is in the best interests of the child. *Schleisman v. Schleisman*, 989 S.W. 2d 664, 671-672 (Mo. App. 1999). In a case in which the birth father's consent has not been filed, the Commissioner already knows that the birth mother and her counsel believe that the birth father is unwilling to execute such a consent. Otherwise they would have obtained it and filed it. Questions about whether the birth father is likely to take steps to actively oppose the adoption are not intended to educate the Commissioner about what she already knows; they are intended to establish a record that the birth mother has consulted with her lawyer about the risks involved in her decision and is willing to permit her parental rights to be terminated despite those risks. That is why Mr.

Krigel's questions to the birth mother begin by demonstrating that he and the birth mother had had consulted at length about the matter.

In light of the purpose of the hearing, Informant's litany of questions that Mr. Krigel did not ask does not have the sinister cast Informant suggests. (Informant's brief at 42). Instead, as Professor Mary Beck testified, they were the "usual and customary" questions asked in order to demonstrate that the birth mother's consent was made knowingly and voluntarily. (S.App. at A158) [DHT at 461– 463]. Mr. Krigel did not raise questions about the birth father having an attorney because it was simply irrelevant to the question of whether the birth mother's consent is made voluntarily with knowledge of its risks. Further, under Missouri law a represented birth father who has not registered with the Putative Father Registry or filed a Petition for Determination of Paternity is no more entitled to notice of the consent hearing than a non-represented father. Of course, Mr. Krigel did not tell the court that his client had been communicating with the birth father in the weeks leading up to the birth because he did not know that she had done so. Mr. Krigel did not "advise the judge" that he had lied to Mr. Zimmerman because he did not lie to Mr. Zimmerman.

Informant's claim that Mr. Krigel "did not elicit questions which explained the testimony that birth father had not come forward even though he had been 'consulted at length about the matter'" is simply inaccurate. The next two

questions related to the forms of that consultation, i.e., the birth parents mediation with Ms. Merryfield and the contentious meeting between the families:

> Q. Now (birth father) [sic] has been consulted at length about this matter, has he not?
>
> A. Yes
>
> Q. You and Ms. Merryfield have met with him on at least one occasion.
>
> A. Just once.
>
> Q. Just once. And even though you have talked to him and his family at some length, he has not stepped forward.[9]

(S. App. at A278-A279; April 6, 2010 hearing)(emphasis added).

The questioning in context is fully consistent with Mr. Krigel's testimony that the term "consulted" referred to general discussions throughout the pregnancy. It is utterly inconsistent with Informant's position that "consulted" or "consulted at length" could only refer to conversations after the Merryfield mediation and only refer to conversations that specifically informed the birth father of the pending hearing.

Informant's characterization of the maternal grandparents' actions is similarly misleading. In light of the fact that their daughter had just broken up

[9] The last question is omitted both times Informant quotes this passage. *See* Informant's Brief at 38, 54.

with the birth father—who had refused to marry her and implicitly accused her of sleeping with other men—it is hardly surprising that they took steps to see to it that he did not have access to their house (where he had been spending three nights a week with their daughter) and that she would not be harassed by him. This is particularly true since both families had agreed that all future communications between birth father and birth mother should be through lawyers.

Mr. Krigel's questions posed to birth mother during the April 6th hearing must be taken in context with all the evidence adduced at the hearing, including the birth mother home study, which was offered into evidence at the April 6th hearing. Based upon all the evidence adduced to the Commissioner, the following was disclosed as of the date of the hearing: (1) that birth father was the father of the child; (2) no one other than birth father could be the father; (3) birth father had known of the pregnancy for a substantial period of time;(4) that the birth parents had been together during most of the pregnancy but had broken up roughly a month before the hearing; (5) that birth father knew the due date for the child; (6) birth mother was concerned what action, if any, birth father would take with respect to the child; (7) that birth father had not taken any action to protect his rights; (8) it was birth mother's belief that while birth father might not consent to the adoption, he might also not take any action to oppose the adoption; (9) that birth father had not given birth mother any money, gifts and had not bought baby

things; (10) that birth mother believed that the paternal grandmother was pushing birth father to parent the child; and (11) that a strategy was employed to wait and see if birth father would affirmatively assert his rights. In light of the substantial information presented to Commissioner Merrigan regarding birth father, an argument suggesting deception by Mr. Krigel must fail.

Informant doggedly insists that Mr. Krigel posed questions that were misleading because "he knew that birth father had consistently claimed rights to the child." Informant's Brief at 57. This argument demonstrates a misapplication of the term "rights." The credible evidence supports a finding that Mr. Krigel knew, as he advised the Commissioner, that birth father had not consented to the adoption. However birth father had not registered with the Putative Father Registry or filed a paternity action. Therefore birth father had not claimed rights to the child. Moreover, as discussed above, Mr. Krigel knew and had strong reason to believe that he would not do so in the future.

Informant bears the burden of proof in this case. Importantly, the trier of fact at the April 6, 2010 hearing, Commissioner Merrigan, did not testify in the Disciplinary Hearing and Informant adduced no evidence from her. Mr. Krigel testified that he believed, based upon a substantial number of cases he had conducted before her over a number of years, that Commissioner Merrigan understood the context of his questions; that he did not mislead her. Informant has

offered no evidence to the contrary. Notably, Informant's file reflects that Commissioner Merrigan filed no complaint in this matter to the Office of Chief Disciplinary Counsel or that she concurred with the complaint filed by the subsequent trial judge.

Informant persistently argues that birth father and his attorney were entitled to notice of the proceeding of April 6, 2010 hearing. In actuality, Missouri law required no notice to a putative father who fails to affirmatively assert his paternity in adoption proceedings. However it is important to note that the proceeding wherein Mr. Krigel is alleged to have asked questions that elicited answers that misrepresented the fact of the case was a hearing on the birth mother's request to voluntarily relinquish her parental rights. *See* §§ 211.444; 453.030 RSMo. Such a proceeding is one to determine whether or not the parent's request is knowing, voluntarily and intelligently given, and whether such a request is in the best interests of the child. *Schleisman v. Schleisman*, 989 S.W. 2d 664, 671-672 (Mo. App. 1999). Under the law that existed at that time for a termination to be valid, there must have been a properly filed petition and a holding of a court accepting the consent as freely and voluntarily given. A guardian *ad litem* must be appointed to represent the interests of the child. *Id*. There is no Missouri statutory authority or case law which purports to require notice to anyone else other than the guardian *ad litem* of this hearing. There is no statute or case law which permits anyone to

object to the biological parent's efforts to terminate their own parental rights and it is up to the sole discretion of the court to determine whether or not such a request is not only voluntary but in the best interests of the child. Under all these circumstances, the Informant's arguments that neither birth father nor his attorney received notice of the April 6, 2010 hearing on birth mother's consent to terminate her parental rights has no import in this case. *See* Informant's Brief at 51.

D. MR. KRIGEL DID NOT KNOWINGLY MAKE A FALSE STATEMENT TO MR. ZIMMERMAN IN VIOLATION OF 4-4.1(a)

Rule 4-4.1, Truthfulness in Statements to Others, states in relevant part:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person.

Comment 1 to the Rule provides that "[a] lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform opposing party of relevant facts." A "material fact" is one of such probative force as would control or determine the result of the litigation. *In re Ver Dught*, 825 S. W. 2d 827, 850 (Mo. 1992). In order to prove a violation of the rule, Informant must show by a preponderance of the evidence that Mr. Krigel knowingly made a material false statement.

Mr. Zimmerman described the statement that Mr. Krigel allegedly made alternatively as "[w]ell, without the father's consent I don't think there will be an

adoption," or "[w]ithout the father's consent that there wouldn't be an adoption." Mr. Zimmerman acknowledged that his recollection of what Mr. Krigel said was based on his impression of what was said rather than what was actually said. He also admitted that he could have misconstrued Mr. Krigel's statement. Mr. Zimmerman stated that he interpreted Respondent's statement "to the effect of there's a hurdle if you don't have the parents' consent to an adoption." Ultimately Mr. Zimmerman conceded that Mr. Krigel did not, in fact, promise there would not be an adoption or that there would not be an adoption without the biological father's consent. (S. App at A95-A96; A98)[DHT at 214-217; 227-228]. Further Mr. Zimmerman candidly acknowledged that he may have misinterpreted Mr. Krigel's statement.

Mr. Zimmerman admitted that he may have misinterpreted Mr. Krigel's statement. Even without that admission, there are powerful independent reasons to believe that Mr. Zimmerman misunderstood, misinterpreted, or misremembered the conversation. At the time of his conversation with Mr. Krigel, Mr. Zimmerman already believed, based on what he remembered from law school, that an adoption could not occur without the birth father's consent. He admitted that this pre-existing mindset may have colored his understanding of what Mr. Krigel said. Moreover, there is no evidence that Mr. Zimmerman had any contemporaneous notes regarding his conversation with Mr. Krigel, or that he ever relayed the

alleged statement to his client or anyone else. His first claim that Mr. Krigel had made such as statement occurred after Mr. Zimmerman was informed that he had, in essence, committed serious malpractice by failing to give his client proper advice to immediately file with the Putative Father Registry and to file a paternity action. By failing to give this advice, Mr. Zimmerman seriously jeopardized his client's interests. At the very least, this may have caused Mr. Zimmerman to unconsciously reshape his memory in a way that excused his conduct. Thus, as this Court exercises its duty to review the evidence *de novo*, there is substantial reasons to discount Mr. Zimmerman's vacillating and equivocal testimony.

Mr. Krigel testified that he never told Mr. Zimmerman that there would not be an adoption without the birth father's consent and that he did not lie to Mr. Zimmerman or mislead him.[10] To disbelieve Mr. Krigel – to conclude that he

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[10] Informant advises this Court that Mr. Krigel made the subject statement to Mr. Zimmerman simply to provide him a statement of controlling law in Missouri. Informant's Brief at 60, fn. 15. This assertion misstates Mr. Krigel's testimony and is made without citation. Mr. Krigel has consistently contented that he has no recollection of making the subject statement and does not believe he made the statement. ("I absolutely never said that to him.") Testimony of Mr. Krigel, (S.App at A135)[DHT at 369]. Because he denies making the statement, he could not have made testified about controlling law in Missouri in the context of that subject statement. Likewise, Mr.

knowingly and falsely told Mr. Zimmerman that the birth father's consent was a prerequisite for the adoption to go forward – one would have to believe a series of highly unlikely propositions:

- That Mr. Krigel was willing to lie to a friend he had known for years about a very serious matter.
- That he was willing to do so on a point that a competent lawyer representing a birth father would know was a lie. [11]
- That he was willing to do so on a point that was easily checked and would in fact be checked by any competent lawyer.
- That he was willing to do so in a routine matter in which he had no significant personal or financial interest.
- That he was willing to do so at a time when he there was still a significant chance that the birthparents would reconcile.

Zimmerman testified that he did not ask Mr. Krigel any questions about the law. (S.App at A96)[DHT at 220].

[11] Or, if the statement were interpreted as a promise, one would have to believe that Mr. Krigel was willing to make such a promise to a long-time friend even though his failure to keep that promise would inevitably come to light. Of course, Mr. Zimmerman stated that he did not consider the alleged statement to be a promise and a promise is not a statement of fact covered by Rule 4-4.1(a).

Simply put, it would have made no sense for Mr. Krigel to have lied to Mr. Zimmerman in this situation. In its ` review of the facts in this case, the Court should credit Mr. Krigel's testimony that he did not do so.

Based upon the foregoing, Mr. Krigel asks this Court to find that he did not violate Rule of Professional Conduct 4-4.1(a).

E. MR. KRIGEL'S LEGAL STRATEGY DID NOT IMPAIR AND DELAY BIRTH FATHER'S ABILITY TO ASSERT HIS PARENTAL RIGHTS

Informant contends that Mr. Krigel violated Professional Rule of Conduct 4-4.4(a), Respect for Rights of Third Persons because the legal strategy employed on behalf of his client "had no substantial purpose other than to impair and delay birth father's assertion of his parental rights . . . ." Informant's Brief at 61. This assertion ignores the governing law of Missouri which states that a presumed father has no rights until he affirmatively takes actions to assert his parental rights. Correspondingly, under Missouri law, the putative father controls his access to his rights. He simply has to take the steps provided by law to protect his parental rights. In this case, birth father took no such steps. Litigating the biological parents' differences in court, prior to or on April 6, 2010, was not even an option since birth father had not taken any steps under the law to be entitled to legal recognition as a parent.

Birth mother retained Mr. Krigel to assist her in a legitimate legal objective: to terminate her parental rights in order that her child could be placed in a loving, two parent home. Contrary to the arguments made by Informant, Mr. Krigel did not formulate the legal strategy to prevent birth father from doing those things birth father needed to do to protect his parental rights. He created the strategy to assist his client, to whom he had a duty, to meet her legitimate legal objective. As a practical matter, Mr. Krigel's strategy could not have prevented birth father from asserting his parental rights. Only birth father could do that, which is in fact what he did in this case. Birth father failed, in a timely matter to take any legal action to protect his rights to the child; he took no action which would demonstrate an intent to parent, such as pay for any living expenses or medical care for the mother prior to birth or at or around birth or purchase items for the expectant child. In fact, the only affirmative action birth father took was to disclaim paternity and ask for a DNA test.

Rule of Professional Conduct 4-4.4(a) provides in relevant part:

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person or use methods of obtaining evidence that violates the legal rights of such a person.

Comment 1 of the rule states that

> Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as client-lawyer relationship.

Clearly the comment supports a finding that the rule does not displace a lawyer's responsibility to his or her own client. Mr. Krigel did not disregard the rights of birth father. He took no action to prevent birth father from asserting his parental rights. However he took no steps to provide legal advice to birth father. This conduct is not contrary to the Rules of Professional Conduct.

Informant contends that *In re Wallingford*, 799 S.W. 2d 76 (Mo. banc 1990) is instructive. Mr. Krigel agrees. In the case, the attorney devised a strategy to force an out- of-state mother to submit to the jurisdiction of Missouri. That strategy included depriving the mother of child support payments and paying those payments to the Jackson County Administrator. When the mother called and spoke to the attorney, the attorney affirmatively provided advice by suggesting that mother obtain information about the child support payments by entering into

litigation filed by the father in Missouri. *Id.* at 77. This Court found that the delineated conduct did not violate Rule 4-4.4(a). *Id.*

Unlike the attorney in *In re Wallingford*, Mr. Krigel did not direct his client to take steps to deprive an individual of their legal rights; he did not devise a strategy to deprive a person of their legal rights; and he did not provide advice to an individual other than his client. Mr. Krigel's alleged conduct pales in contrast to the allegations in the *Wallingford* case, in which this Court found the actions of the attorney did not constitute a violation of rule 4-4.4(a).

The Informant suggests to this Court that Mr. Krigel had an ethical obligation to affirmatively provide unsolicited information to the birth father and his counsel. The attorney-client privilege protects confidential communications between an attorney and client concerning matters regarding the representation. Rule 4–1.6; *State ex rel. Polytech, Inc. v. Voorhees*, 895 S.W.2d 13, 14 (Mo. banc 1995). As the Western District Court of Appeals noted in *Roth v. La Societe Anonyme Turbomecu France*, 120 S.W. 3d 764 (Mo. App. 2003), "[a]lthough an attorney should endeavor to avoid causing needless pain to opposing parties in litigation, the law does not impose a duty to do so." *Id.* at 776. *See also, Bates v. Law Firm of Dysart, Taylor, Penner, Lay and Lewandowski*, 844 S.W.2d 1, 5 (Mo.App.1992). ("While it is desirable that litigation attorneys exercise every consideration to avoid causing needless pain to opposing parties, the law

recognizes no legal duty to exercise care for the interests of opposing parties.") The Informant seeks to place upon Mr. Krigel a legal duty to birth father and his counsel which simply does not exist in this case.

Mr. Krigel's substantial purpose in employing the "wait and see" strategy was to assist his client in her legitimate legal objective. *See e.g., State ex rel. Scales v. Committee on Legal Ethics*, 446 S.E. 2d 729, 733 (W. Va. 1994) (Attorney for wife had substantial purpose other than to harass or embarrass husband of client when she contacted husband's commanding officer and advised commanding officer of alleged domestic violence. Therefore no violation of Rule 4-4.4 occurred). It was not utilized for the purpose of preventing birth father from asserting his parental rights. Mr. Krigel's conduct did not violate Rule 4-4.4(a) and he asks this Court to find accordingly.

F. MR. KRIGEL DID NOT ENGAGE IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE

The allegations by Informant that Mr. Krigel violated Rule of Professional Conduct 4-8.4(d) is based upon the prior allegations of ethical violations and flow in large part from his legal strategy employed in the underlying case. Mr. Krigel, while pursuing his client's lawful objectives, used an overall strategy which even Informant acknowledges is widely used by knowledgeable adoption attorneys throughout the state. Rule 4–8.4 defines professional misconduct for which an

attorney may be disciplined. Rule 4–8.4(a) states that "[i]t is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct." *See also*, *In re Caranchini*, 956 S.W.2d 910, 916 (Mo. banc 1997). Comment 1 to the rule states that the Rule "does not prohibit a lawyer from advising a client concerning actions the client is legally entitled to take." Mr. Krigel's employment of the "passive" or "wait and see" strategy did not constitute conduct prejudicial to the administration of justice.

Mr. Krigel had an ethical obligation to his client. Rules 4-1.2(a); 4-1.6. While Mr. Krigel did not seek to bring undue or needless burden to birth father, he had no legal duty to the birth father and therefore had no ethical duty to affirmatively provide legal advice to birth father or his counsel or provide to birth father or his counsel his client's confidential information, including her legal objective. In communicating with Mr. Zimmerman, Mr. Krigel complied with his ethical responsibilities.

For the reasons previously set forth in this brief, Mr. Krigel's conduct did not violate the Rules of Professional Conduct and therefore did not constitute conduct prejudicial to the administration of justice as prohibited under Rule 4-8.4(d).

CONCLUSION

This is not a case about a biological father who did not know of a pregnancy so that he could not assert his parental rights. This is not a case where a putative father did not have access to an attorney of his own choosing in order to protect his paternal rights. Rather this case involves a birth father who failed to avail himself of the means legislated by the General Assembly to protect his constitutional rights and continued to question his paternity. Birth father did not, despite knowing of the pregnancy for over eight months and of the birth mother's desire to place the child for adoption, either (1) file a claim of intent of paternity with the Putative Father Registry or (2) file a petition for paternity. Consequently birth father had no legal rights under Missouri law.

Mr. Krigel, as a practicing lawyer in the State of Missouri, had a right to rely on the law to formulate a strategy to represent his client. He had a right to explain to his client Missouri law when advising her of her options. While some may disagree on the propriety of the law as it is applied to putative fathers, it is the law that has been legally passed by the General Assembly, found constitutional by this Court and which is in full force and effect. It is contrary to the essence of the practice of law to find Mr. Krigel in violation of the Rules of Professional Conduct for legitimately relying on the law to perform his duties for his client. Mr. Krigel did not violate the Rules of Professional Conduct and the Information should be dismissed.

POINT II

MR. KRIGEL'S CONDUCT DOES NOT WARRANT SANCTIONS AS ARGUED BY INFORMANT.

The Informant argues to this Court that Mr. Krigel showed no remorse in the implementation and use of a "passive" or "wait and see" strategy in the underlying case, his alleged statement to Mr. Zimmerman, or his conduct during the April 6, 2010 hearing. The Informant emphasizes that Mr. Krigel did not admit to any violation of the ethical rules. However, Mr. Krigel did express remorse and regret to the Hearing Panel over the circumstances of the case and how events unfolded. Mr. Krigel stated that he would never have offered the testimony of birth mother if he had known she was deceiving the birth father; that he would have withdrawn from her representation. Mr. Krigel expressed regret that he somehow didn't fully understand the pain and turmoil that his client was going through, which fueled her anger and deception. He also expressed regret that a friend and colleague may have misheard, misunderstood, or misinterpreted any comment he made.

Yet, as set forth in Point I, Mr. Krigel has a strong legal and factual basis for maintaining his innocence from the charges set forth by Informant. Even the Informant concedes that the strategy employed by Mr. Krigel is not unique among Missouri practicing attorneys. Professor Beck and Mr. Belfonte both testified that the strategy is regularly used by attorneys practicing in the field of adoption law. Professor Beck testified that the strategy was consistent with Missouri law and is

one that is taught at this State's legal institutions. Under such facts and circumstances, Mr. Krigel believed he understood the law and rules, and had an honest, good faith basis for believing that the strategy he recommended to his client and used was not only appropriate but ethical. As this Court has noted, attorneys must follow their clients' instructions if such instructions are within the limits of the law. *In re Mirabile, 975 S. W. 2d 936, 939 (Mo. banc 1998); Jarnagin v. Terry*, 807 S.W.2d 190, 194 (Mo.App. W.D.1991). "The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations." *Comment, Rule 4–1.2.* Mr. Krigel's client had a legitimate and lawful objective in seeking legal representation; a safe and permanent home for her unborn child. Mr. Krigel pursued a course of trial strategy that met his client's objectives within the limits of Missouri law and the Rules of Professional Conduct.

Mr. Krigel also believed, based on the hundreds of cases he had before the Commissioner, that the Commissioner understood his line of questioning. He certainly did not intend or knowingly attempt to mislead the court. Similarly, Mr. Krigel did not knowingly or intentionally make a false statement to a fellow member of the profession. Under the circumstances of this case, Mr. Krigel maintains that this Court should not impose any sanctions because his conduct was not in violation of the ethical rules.

Should this Court believe that a sanction is necessary, it need consider Mr. Krigel's honest and good faith belief in his understanding of the law; an understanding shared by many attorneys in this State. If his understanding of Missouri law, and his subsequent implementation of a strategy he believed consistent with the law and rules of ethics, was incorrect, then such misunderstanding was neither intentional nor knowing. At worst, Mr. Krigel's actions were negligent. Mr. Krigel also believed that his questions and statements to the Commissioner were not intentionally or knowingly misleading to the court. Consistent with the ABA Standards for Imposing Lawyer Sanctions (1991 ed) § 6.33 and 6.34, negligent conduct would warrant the lowest sanction within the Court's discretion. Negligent misconduct certainly would not support the loss of Mr. Krigel's law license and/or the ability to practice the profession he has been devoted to for virtually his entire adult life.[12]

The Informant argues as an aggravating factor, the multiplicity of the alleged violations. However, in reality three of the four alleged violations flow from Mr.

[12] Contrary to informant's assertion at page 67 of its brief that the recommended sanction was disbarment, the Disciplinary Hearing Panel found the appropriate sanction to be indefinite suspension with no leave to file for reinstatement for a period of six months. Moreover, this recommendation loses relevance unless the Court agrees with all of the Panel's findings of violations.

Krigel's honest belief in his understanding of Missouri law and the rules, as well as his subsequent presentation of evidence before the Commissioner. Mr. Krigel testified to the Disciplinary Hearing that if this Court determined that the strategy was inconsistent with Missouri law, he would certainly not utilize such a strategy in the future. There was simply no intent by Mr. Krigel to intentionally or knowing circumvent or violate the ethical rules.

Should this Court believe that the alleged statement to Mr. Zimmerman occurred or that Mr. Krigel made an erroneous statement, the evidence supports a finding it was not a knowing material false statement. Mr. Krigel testified that he never intended to mislead Mr. Zimmerman or confuse Mr. Zimmerman. Mr. Zimmerman conceded that he could have misunderstood Mr. Krigel and that he did not rely on the alleged statement. Under such circumstances, a finding that Mr. Krigel's conduct does not necessitate a sanction because it was not a knowing or material statement would be appropriate.

Mr. Krigel recognizes that, as in most contested adoption proceedings, in this case a birth parent sustained loss of time with his child and costs were incurred in the litigation of the matter. However, Mr. Krigel asks this Court to consider that the birth father always controlled his ability to assert his parental rights and to protect his legal interests. The implementation of the "passive" or "wait and see" strategy did not prevent or hinder the birth father from his parental rights. Mr.

Krigel's legal strategy had little relationship to the loss of parenting time or associated costs of litigation in the underlying case, but rather was in large part attributable to birth father's independent decision making.

The cases cited by Informant to support the imposition of a sanction of suspension are *contra* to the facts of this case. The cited cases all address either intentional or knowing presentation of false evidence or knowing attempts to mislead the court. The present case is dissimilar to *In re Caranchini*, 956 S.W. 2d 910 (Mo banc 1997) where the attorney purposefully ignored well established Kansas law in make specious arguments to the court for an improper purpose. The attorney in *In re Oberhellman*, 873 S.W. 2d 851 (Mo. banc 1994) specifically instructed his client to make false statements. Likewise in *In re Storment*, 873 S. W. 2d 227 (Mo. banc 1994) an attorney told his client to lie. The Disciplinary Hearing Panel in this case found that Mr. Krigel did not instruct his client to make false or deceptive statements. Informant argues that the facts of *In re Ver Dught*, 825 S.W. 2d 847 (Mo. banc 1992) are similar to this case. This argument is misplaced. In *Ver Dught*, an attorney assisted a client to obtain Supplemental Security Income and Disabled Widow's Benefits following the death of her first husband. Prior to the hearing on her request for benefits, the client had remarried and the attorney was concerned to what affect the marriage would have on the receipt of benefits. The attorney specifically instructed his client to avoid

discussing her remarriage; he told his client to take off her engagement and wedding rings; and he purposefully referred to his client, not by her current married name but rather the last name of her deceased first husband. *Id*. at 850. No such similar facts exist in this case. Mr. Krigel never instructed his client to lie, mislead or deceive the Commissioner but rather tried to make a forthright presentation to the Commissioner of all facts known at that time. Mr. Krigel through the evidence and testimony notified the Court of the name, address and relevant information regarding the birth father. Mr. Krigel advised the Commissioner of the strategy invoked in the case. Mr. Krigel told the Court of his client's belief that while the birth father would not consent, that he would not take the necessary steps to assert his parental rights. The record reflects that Mr. Krigel did not intentionally or knowingly mislead, deceive or confuse the Commissioner.

The Informant has failed to produce any evidence that supports a finding that Mr. Krigel committed ethical violations. The strategy utilized by Mr. Krigel was consistent with Missouri law. Mr. Krigel did not make a false statement of material fact to Mr. Zimmerman. Any error, if made, was at best negligent and not intentional. Mr. Krigel has practiced law for 39 years, with honor and distinction, and without disciplinary complaint by the Office of Chief Disciplinary Counsel. He has been a productive and contributing member of the Missouri Bar. In the five years since the underlying case occurred, no additional complaints have been filed

against him. The purpose of discipline is not to punish the attorney, but to protect the public and maintain the integrity of the legal profession. *In re Carey,* 89 S.W. 3d 477, 502 (Mo. banc 2002). Neither the public trust nor the profession's integrity is threatened by Mr. Krigel's continued, uninterrupted practice of law. Mr. Krigel respectfully urges this Court to find that no sanction is warranted in this case.

CONCLUSION

For the reasons set forth herein, Mr. Krigel respectfully requests this Court to dismiss the Information

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October, 2015, a copy of Respondent's Brief is being served via U.S. Mail and through the Missouri Supreme Court's electronic filing system pursuant to Rule 103.08 to:

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CERTIFICATION

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(c);

3. Contains 20,019 words, in Microsoft Word format, which is the word processing system used to prepare this brief.

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